STATE OF MICHIGAN

COURT OF APPEALS

HOME-OWNERS INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 21, 2017
v	No. 334349 Ingham Circuit Court
FRANKENMUTH MUTUAL INSURANCE COMPANY, Defendant/Counter-Plaintiff-Appellant.	LC No. 15-000111-CK

Before: O'CONNELL, P.J., and MURPHY and K. F. KELLY, JJ.

PER CURIAM.

This dispute between no-fault insurers turns on the domicile of the minor child of divorced parents at the time of the car accident that caused injury to the child. Defendant, Frankenmuth Mutual Insurance Company (Frankenmuth), appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of plaintiff, Home-Owners Insurance Company (Home-Owners), and denying Frankenmuth's motion for summary disposition under MCR 2.116(I)(2) (nonmoving party entitled to judgment). The trial court ruled that Frankenmuth was the highest priority insurer under MCL 500.3114(1) because the child's domicile was with her father, Frankenmuth's insured, at the time of the accident. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Samantha is the minor child of Lisa Ruby and Robert Ruby, who divorced in 2009. In the divorce proceeding, the court awarded Lisa and Robert joint legal and physical custody of Samantha and scheduled equal parenting time. According to the court order, Samantha lived with Lisa for the first half of the week and with Robert for the second half of the week, alternating Wednesday and Thursday as the mid-point of the week.

Samantha was injured in an automobile accident in February 2014. Home-Owners insured the owner of the car Samantha was riding in during the accident.

On the day of the accident, Samantha was living with her father, Robert. Robert had insurance through Frankenmuth.

Frankenmuth maintained that it initially processed claims for no-fault benefits but ceased making payments when it investigated and determined, in its opinion, that Samantha was domiciled with her mother. Home-Owners alleged that it also made payments but disputed that it was the primary insurer responsible for paying the claims.

In February 2015, Home-Owners sued Frankenmuth, seeking a declaration that Frankenmuth was first in priority to pay Samantha's claims. Home-Owners also sought reimbursement for the claims it had paid. Frankenmuth filed a counter-complaint, seeking a declaration that Home-Owners was first in priority and requesting reimbursement for its payment of claims.

Home-Owners moved for summary disposition under MCR 2.116(C)(10). Frankenmuth opposed the motion and moved for summary disposition under MCR 2.116(I)(2). The parties agreed that priority depended on which parent Samantha was domiciled with under MCL 500.3114(1). The trial court applied *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 512 n 78; 835 NW2d 363 (2013), to conclude that Frankenmuth was first in priority because Samantha was domiciled with her father on the day of the accident.

II. STANDARD OF REVIEW

We review de novo a ruling on a motion for summary disposition. *Radu v Herndon & Herndon Investigations, Inc*, 302 Mich App 363, 373; 838 NW2d 720 (2013). MCR 2.116(C)(10) allows a trial court to grant summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). Summary disposition under MCR 2.116(C)(10) is proper if the evidence, viewed in the light most favorable to the nonmoving party, does not give rise to a genuine issue of material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

A domicile determination relying on undisputed facts is a question of law. *Grange*, 494 Mich at 490. We review questions of law de novo. *City of Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

III. ANALYSIS

The no-fault act, MCL 500.3101 *et seq*., requires drivers to hold personal protection insurance (PIP) to cover bodily injury claims resulting from car accidents. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 443; 814 NW2d 670 (2012). MCL 500.3114(1) extends PIP benefits "to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." MCL 500.3114(1). MCL 500.3114(4) states as follows:

> (4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.

(b) The insurer of the operator of the vehicle occupied.

Accordingly, if the accident victim is domiciled with a relative who has no-fault insurance, that insurer has priority over the insurer of the owner of the vehicle carrying the victim. As the rule pertains to this case, if Samantha was domiciled with her father, Frankenmuth was responsible for paying her claims. Otherwise, Home-Owners was responsible for payment.

Our Supreme Court has held that, when "a child's parents are divorced, the family court's custody order entered pursuant to the Child Custody Act establishes the child's domicile by operation of law and is determinative of the child's domicile for purposes of the no-fault act[.]" *Grange*, 494 Mich at 510. The Supreme Court emphasized the significance of physical custody because domicile involves location, even if the parents have joint legal custody. *Id*. at 511-512. Accordingly, a custody order conclusively establishes domicile with a parent "if the custody order grants that parent primary or sole physical custody, or expressly establishes domicile with that parent through a domicile provision, regardless of whether the parents share joint legal custody." *Id*. at 512.

The Supreme Court further explained that if the custody order gives the parents joint physical custody, domicile is with the parent who has "*primary* physical custody" or who "has physical custody more often than the other parent despite the joint physical custody arrangement." *Id*. at 512 n 78.[1] The Supreme Court continued:

> In the unusual event that a custody order *does* grant an equal division of physical custody, and only in this instance, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living at the time. Thus, the child's domicile is with the parent who has physical custody as established by the custody order at the specific time of the incident at issue. [*Id*. at 513 n 78 (citation omitted).]

Frankenmuth first argues that the domicile provision in the judgment of divorce expressly established Samantha's domicile with Lisa because it listed Lisa's address as the child's current address. We disagree.

The relevant provision in the judgment of divorce provides as follows:

> RESIDENCE AND DOMICILE OF THE MINOR CHILD
>
> Except as otherwise provided by statute, a parent whose custody or parenting time of a child is governed by this order shall not change a legal

[1] "When a court of last resort intentionally takes up, discusses and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *Carr v City of Lansing*, 259 Mich App 376, 384; 674 NW2d 168 (2003) (citations, quotation marks, and alteration omitted).

> residence of a child to a location that is more than one hundred (100) miles from the child's legal residence at the time the commencement of the action in which the order is issued, except in compliance with Section 11 of the child Custody Act of 1970, 1970 PA 91, MCL 722.31. That section requires either the consent of the other parent, which must be in writing and filed with the court, or an order of this court, unless the change results in the parents' homes being closer to each other than before the marriage.
>
> The minor child's residence or domicile may not be moved from the state of Michigan without prior approval of the court. The custodial parent shall notify the Friend of the Court whenever the minor child is moved to another address within 21 days.

The provision ends by listing Lisa's address at the time of the divorce as the child's "current address[.]"

The provision refers to both residence and domicile. The Supreme Court has explained that a residence reflects a physical home, whereas domicile is a legal home. *Grange*, 494 Mich at 494. A child has only one domicile at a time but may have more than one residence. *Id*. at 507.

The listing of Lisa's address at the time of the judgment of divorce reflected Samantha's residence but was not determinative of her domicile because the parents evenly shared physical custody and parenting time. Additionally, the custody order incorporated into the judgment of divorce stated that Samantha was residing with both parents at the time, undermining Frankenmuth's argument that the address establishes domicile. Rather, the residence and domicile provision in the judgment of divorce is consistent with the Supreme Court's explanation that a child's domicile alternates when the child moves back and forth between equal custodial parents. See *id*. at 512 n 78. Thus, this provision does not expressly establish Samantha's domicile with Lisa only.

Moreover, the reference to the "custodial parent" in the provision in this case distinguishes it from the domicile provision described in *ACIA v State Farm*, the case consolidated and decided with *Grange*, 494 Mich at 481, 486. The provision in *ACIA* refers only to the children's father, reflecting the award of primary physical custody of the minor children to the father. *Id*. at 486. Because the father "retained primary physical custody[,]" the child's domicile "changed by operation of law" when the father obtained an order permitting a change in residency to Tennessee. *Id*. at 514-515. Therefore, the Supreme Court concluded, the child was domiciled in Tennessee with her father at the time of the accident, even though the child was living in Michigan with her mother when the accident occurred. *Id*. at 515. Accordingly, the initial award of primary physical custody to the father in *ACIA* distinguishes that case from this one, in which the judgment of divorce gave Robert and Lisa joint physical custody of Samantha.

Lisa and Robert had joint legal and physical custody, and the custody order evenly divided their time with the child on a rotating weekly schedule. Frankenmuth argues that the trial court erred by finding that the parents had equal physical custodial time with Samantha

because Lisa had custody of Samantha on snow days and school holidays, which included summer break, as described in a subsequent parenting time order.

We agree with the trial court that this arrangement reflected child care, not physical custody, because Samantha still lived with each parent for an equal amount of time. "Physical custody refers to a child's living arrangements." *Lieberman v Orr*, 319 Mich App 68, 79; 900 NW2d 130 (2017). "Where a court order sets a child's custody or domicile by operation of law, the factual circumstances or the parents' or child's intentions are irrelevant to the domicile determination." *Grange*, 494 Mich at 511.

The subsequent parenting time order that Frankenmuth relies on reaffirmed the equal physical custody arrangement outlined in the judgment of divorce. The original custody order memorialized the parents' agreement that Samantha will stay with Lisa on snow days and on school holidays instead of going to daycare. The subsequent order construed the term "school holidays" to include summer break. Accordingly, Samantha stayed at her mother's house during the day on snow days and school holidays, including summer break, and returned to her father's home in the evening when she was living with him. This childcare arrangement made sense because Lisa worked as a teacher at Samantha's school. Thus, "the factual circumstances" of this practical arrangement had no legal effect and did not alter the parents' equal physical custody. See *id*. at 511.

In sum, the trial court correctly applied footnote 78 of the *Grange* opinion. Samantha's domicile alternates between her parents, depending on which parent she is living with at the time. On the day of the accident, Samantha was living with her father, Frankenmuth's insured. Therefore, Samantha was domiciled with her father on the day of the accident, and Frankenmuth was first in priority to pay her no-fault benefits.

We affirm.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kirsten Frank Kelly